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U.S. Department of Homeland Security
U.S. Immigration and Citizenship Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

H5.

[redacted]

FILE: [redacted] Office: LOS ANGELES, CA Date: AUG 23 2010

IN RE: Applicant: [redacted]

APPLICATION: Application for Waiver of Grounds of Inadmissibility under section 212(i) of the Immigration and Nationality Act, 8 U.S.C. § 1182(i)

ON BEHALF OF APPLICANT:

[redacted]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $585. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

[redacted]

Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Field Office Director, Los Angeles, California, and is now before the Administrative Appeals Office (AAO) on appeal. The application shall be remanded back to the director for action consistent with the directives of this decision.

The applicant is a native and citizen of Mexico who was found to be inadmissible to the United States under pursuant to section 212(a)(9)(C) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(2)(A)(i)(I), as an alien unlawfully present after a previous immigration violation; and under section 212(a)(2)(A)(i)(I) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(2)(A)(i)(I), for having been convicted of committing a crime involving moral turpitude. The applicant sought a waiver of inadmissibility pursuant to section 212(h) of the Act, 8 U.S.C. § 1182(h). The director stated that since the applicant was deported from the United States in 1984 and reentered the United States without inspection in 1992 he is inadmissible under section 212(a)(9)(C)(i)(II) of the Act, which ground of inadmissibility is not waivable. Consequently, the director denied the Application for Waiver of Grounds of Inadmissibility (Form I-601).

On appeal, counsel contends that section 212(a)(9)(C)(i)(II) of the Act was improperly applied and the applicant's criminal record should not bar his adjustment of status. Counsel states that the applicant might be inadmissible for having been convicted of committing crimes involving moral turpitude: receipt of stolen property in 1982, and giving false information to a peace officer in 1983. Counsel asserts that there is no available criminal record for the receipt of stolen property conviction, so it cannot be demonstrated that the applicant intended to permanent deprive the victim of his property. Counsel maintains that giving false information to a peace officer qualifies for the petty offense exception, so the applicant does not require a section 212(h) waiver of inadmissibility. Furthermore, counsel declares that because the applicant's last conviction was in 1989, he is eligible for a waiver under section 212(h)(1)(A) of the Act.

The AAO will first address the finding of inadmissibility. Section 212(a)(9)(C) of the Act states:

> (C) Aliens unlawfully present after previous immigration violations.-
>
> (i) In general.-
>
> Any alien who-
>
> (I) has been unlawfully present in the United States for an aggregate period of more than 1 year, or
>
> (II) has been ordered removed under section 235(b)(1), section 240, or any other provision of law, and who enters or attempts to reenter the United States without being admitted is inadmissible.
>
> (ii) Exception.- Clause (i) shall not apply to an alien seeking admission more than 10 years after the date of the alien's last departure from the United States if, prior to the alien's reembarkation at a place outside the United States or attempt to be readmitted from a foreign contiguous

territory, the Secretary has consented to the alien's reapplying for admission. The Secretary, in the Secretary's discretion, may waive the provisions of section 212(a)(9)(C)(i) in the case of an alien to whom the Secretary has granted classification under clause (iii), (iv), or (v) of section 204(a)(1)(A), or classification under clause (ii), (iii), or (iv) of section 204(a)(1)(B), in any case in which there is a connection between—

(1) the alien's having been battered or subjected to extreme cruelty; and

(2) the alien's--

(A) removal;

(B) departure from the United States;

(C) reentry or reentries into the United States; or

(D) attempted reentry into the United States.

The applicant is not inadmissible under section 212(a)(9)(C)(i)(II) of the Act. The Foreign Affairs Manual (FAM) provides that "a prior removal, applies without regard to when such removal occurred. Although the second trigger may apply regardless of when the removal occurred, the provision would only apply if the illegal re-entry and/or attempted re-entry occurred on or after April 1, 1997, the date this visa ineligibility went into effect." *See* 9 FAM 40.93 N.1, Ineligibility under INA 212(a)(9)(C). The record reflects that an immigration judge ordered the applicant's deportation from the United States under section 242 of the Act on August 8, 1984 and his last reentry into the United States without inspection was in 1992. He is therefore not inadmissible under section 212(a)(9)(C)(i)(II) of the Act.

The AAO will now address the finding of inadmissibility under section 212(a)(2) of the Act. Section 212(a)(2)(A) of the Act states, in pertinent parts:

(i) [A]ny alien convicted of, or who admits having committed, or who admits committing acts which constitute the essential elements of –

(I) a crime involving moral turpitude (other than a purely political offense) or an attempt or conspiracy to commit such a crime . . . is inadmissible.

The record reflects that the applicant was convicted of the following misdemeanor offenses in California:

Conviction date	Offense/Sentence
[redacted]	

	242 (2 counts – battery) 180 days jail, 36 months probation
January 7, 1982	Cal. Penal Code § 496 (2 counts - receiving stolen property) 30 days jail, 36 months probation
May 5, 1983	Cal. Vehicle Code § 20002 (hit and run property damage)
April 22, 1983	Cal. Penal Code § 12420 (possession tear gas)
September 13, 1983	Cal. Vehicle Code § 31 (False info. to peace officer) 60 days jail
May 23, 1989	Cal. Penal Code § 594(b)(3) (vandalism) 4 days jail; 36 months probation
September 20, 1989	Cal. Health & Safety Code § 11350(a) (possession controlled substance - cocaine) 180 days jail, 60 months probation

We note that the applicant's conviction for violation of Cal. Health & Safety Code § 11350(a) was set aside and dismissed pursuant to Cal. Penal Code § 12034, and in view of *Lujan-Armendariz v. INS*, 222 F.3d 728 (9th Cir. 2000), her conviction is eliminated under the Federal First Offender Act (FFOA) for immigration purposes because it is his only drug-related conviction.

The Board of Immigration Appeals (Board) held in *Matter of Perez-Contreras*, 20 I&N Dec. 615, 617-18 (BIA 1992), that:

> [M]oral turpitude is a nebulous concept, which refers generally to conduct that shocks the public conscience as being inherently base, vile, or depraved, contrary to the rules of morality and the duties owed between man and man, either one's fellow man or society in general....
>
> In determining whether a crime involves moral turpitude, we consider whether the act is accompanied by a vicious motive or corrupt mind. Where knowing or intentional conduct is an element of an offense, we have found moral turpitude to be present. However, where the required mens rea may not be determined from the statute, moral turpitude does not inhere.

(Citations omitted.)

To determine if a crime involves moral turpitude, the Ninth Circuit Court of Appeals first applies the categorical approach. *Nunez v. Holder*, 594 F.3d 1124, 1129 (9th Cir. 2010) (citing *Nicanor-Romero v. Mukasey*, 523 F.3d 992, 999 (9th Cir.2008). This approach requires analyzing the elements of the crime to determine whether all of the proscribed conduct involves moral turpitude. *Nicanor-Romero, supra* at 999. In *Nicanor-Romero*, the Ninth Circuit states that in making this

determination there must be "a realistic probability, not a theoretical possibility, that the statute would be applied to reach conduct that did not involve moral turpitude. *Id.* at 1004 (quoting *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 193 (2007). A realistic probability can be established by showing that, in at least one other case, which includes the alien's own case, the state courts applied the statute to conduct that did not involve moral turpitude. *Id.* at 1004-05. *See also Matter of Silva-Trevino*, 24 I&N Dec. 687 (A.G. 2008) (whether an offense categorically involves moral turpitude requires reviewing the criminal statute to determine if there is a "realistic probability, not a theoretical possibility," that the statute would be applied to conduct that is not morally turpitudinous).

If the crime does not categorically involve moral turpitude, then the modified categorical approach is applied. [redacted] 581 F.3d 1154, 1161 (9th Cir. 2009). This approach requires looking to the "limited, specified set of documents" that comprise what has become known as the record of conviction—the charging document, a signed plea agreement, jury instructions, guilty pleas, transcripts of a plea proceeding and the judgment—to determine if the conviction entailed admission to, or proof of, the necessary elements of a crime involving moral turpitude. *Id.* at 1161 (citing *Fernando-Ruiz v. Gonzalez*, 466 F.3d 1121, 1132-33 (9th Cir. 2006)).

In 1982, the applicant was convicted of receiving stolen property under Cal. Penal Code § 496(a). That section provides:

> Every person who buys or receives any property that has been stolen or that has been obtained in any manner constituting theft or extortion, knowing the property to be so stolen or obtained, or who conceals, sells, withholds, or aids in concealing, selling, or withholding any property from the owner, knowing the property to be so stolen or obtained, is punishable by imprisonment in a state prison, or in a county jail for not more than one year . However, if the district attorney or the grand jury determines that this action would be in the interests of justice, the district attorney or the grand jury, as the case may be, may, if the value of the property does not exceed four hundred dollars ($400), specify in the accusatory pleading that the offense shall be a misdemeanor, punishable only by imprisonment in a county jail not exceeding one year.

The Ninth Circuit Court of Appeals addressed the issue of whether Cal. Penal Code § 496(a) constitutes a crime involving moral turpitude in *Castillo-Cruz v. Holder*, 581 F.3d 1154, 1160 (9th Cir. 2009). The Court determined that Cal. Penal Code § 496(a) does not require a perpetrator to have the intent to permanently deprive the owner of his or her property, but rather permits conviction for an intent to deprive the owner of his or her property temporarily. *Id.* at 1160-1161. The Court applied the methodology articulated in *Gonzales v. Duenas-Alvarez*, *supra*, for a determination of whether there is a "realistic probability" that Cal. Penal Code § 496(a) would be applied to conduct that does not involve moral turpitude. *Id.* at 1161. The Court concluded that lower courts have upheld convictions under Cal. Penal Code § 496(a) in cases where there was no permanent intent, and as such, a conviction under the statute is not categorically a crime of moral turpitude. *Id.* The Court held that the alien's conviction was not a crime involving moral turpitude under the modified categorical analysis because the government conceded that there is no evidence in the record

establishing that his offense involved an intent to deprive the owner of possession permanently. *Id.* It is noted that the court apparently reviewed only the record of conviction in making this determination.[1] *Id.* (citing *Fernando-Ruiz v. Gonzalez*, 466 F.3d 1121, 1132-33 (9th Cir. 2006).

To prove his conviction under Cal. Penal Code § 496(a) did not involve moral turpitude, the applicant must establish that he did not intend to deprive the owner of his or her property permanently. To meet his burden, the applicant must, at a minimum, submit the available documents that comprise the record of conviction and show that these fail to establish that his conviction was based on conduct involving moral turpitude. To the extent such documents are unavailable, this fact must be established pursuant to the requirements in 8 C.F.R. § 103.2(b)(2). The AAO notes the record contains the applicant's criminal complaint and disposition of arrest and court action for his conviction under Cal. Penal Code § 496. These documents do not demonstrate that his offense included an intent to deprive the owner of his or her property permanently. The letter by the Court Processing Assistant of the Superior Courts of California, County of Ventura, dated February 7, 2007, states that misdemeanor criminal records over five years old have been destroyed pursuant to section 68152 of the Government Code. The AAO notes that the specific intent required to characterize this offense as a crime involving moral turpitude is not an element of the crime, and it is thus unlikely that documentation would exist demonstrating any procedural finding of intent. Accordingly, the AAO will not conclude, based on the record before it that under the modified categorical approach as applied in the Ninth Circuit, the applicant's conviction is a crime involving moral turpitude. *See, e.g., Tijani v. Holder,* 598 F.3d 647 (9th Cir. 2010), *Nunez v. Holder*, 594 F.3d 1124 (9th Cir. 2010).

The applicant's convictions of vandalism in violation of Cal. Penal Code § 594(b)(3) and possession of tear gas in violation of Cal. Penal Code § 12420 do not involve moral turpitude. *See Rodriquez-Herrera v. INS*, 52 F.3d 238 (9th Cir. 1995) (malicious mischief under Washington Criminal Statute 9A.48.080(1)(a) and 9A.04.110(12) held not to be a crime involving moral turpitude where alien damaged some automobiles because malicious mischief does not have the "act of baseness or depravity contrary to accepted moral standards."); *U.S. ex rel. Andreacchi v. Curran*, 38 F.2d 498 (S.D.N.Y. 1926); and *Ex Parte Saraceno*, 182 F. 955 (C.C.N.Y. 1910) (carrying a concealed weapon is not a crime involving moral turpitude).

The applicant was convicted of hit and run – property damage in violation of Cal. Vehicle Code § 20002. Cal. Vehicle Code § 20002 provides:

> (a) The driver of any vehicle involved in an accident resulting only in damage to any property, including vehicles, shall immediately stop the vehicle at the nearest location that will not impede traffic or otherwise jeopardize the safety of other motorists.

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[1] The Ninth Circuit Court of Appeals had previously reserved judgment as to whether it would follow the additional ruling of the [redacted] hat adjudicators may look beyond the record of conviction as part of the modified categorical inquiry. [redacted] (9th Cir. 2009). [redacted] s a refusal by the Ninth Circuit to accept the more expansive review allowed by the Attorney General, and will thus restrict its review in this case to the record of conviction only.

Moving the vehicle in accordance with this subdivision does not affect the question of fault. The driver shall also immediately do either of the following:

> (1) Locate and notify the owner or person in charge of that property of the name and address of the driver and owner of the vehicle involved and, upon locating the driver of any other vehicle involved or the owner or person in charge of any damaged property, upon being requested, present his or her driver's license, and vehicle registration, to the other driver, property owner, or person in charge of that property. The information presented shall include the current residence address of the driver and of the registered owner. If the registered owner of an involved vehicle is present at the scene, he or she shall also, upon request, present his or her driver's license information, if available, or other valid identification to the other involved parties.
>
> (2) Leave in a conspicuous place on the vehicle or other property damaged a written notice giving the name and address of the driver and of the owner of the vehicle involved and a statement of the circumstances thereof and shall without unnecessary delay notify the police department of the city wherein the collision occurred or, if the collision occurred in unincorporated territory, the local headquarters of the Department of the California Highway Patrol.

(b) Any person who parks a vehicle which, prior to the vehicle again being driven, becomes a runaway vehicle and is involved in an accident resulting in damage to any property, attended or unattended, shall comply with the requirements of this section relating to notification and reporting and shall, upon conviction thereof, be liable to the penalties of this section for failure to comply with the requirements.

(c) Any person failing to comply with all the requirements of this section is guilty of a misdemeanor and, upon conviction thereof, shall be punished by imprisonment in the county jail not exceeding six months, or by a fine not exceeding one thousand dollars ($1,000), or by both that imprisonment and fine.

Section 20002 of the Cal. Vehicle Code imposes affirmative reporting requirements on a driver of a vehicle involved in an accident resulting in damage to property, including vehicles. We find that the Ninth Circuit decision, *Cerezo v. Mukasey*, 512 F.3d 1163 (9th Cir. 2008), is instructive in determining whether violation of Cal. Vehicle Code § 20002 involves moral turpitude. In *Cerezo*, the Ninth Circuit analyzed whether violation of Cal. Penal Code § 20001(a), which imposes affirmative duties on a driver involved in a vehicle accident involving injury or death, involves moral turpitude.[2] *Id.* at 1166-1169. The Court determined that the statute "is divisible into several

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[2] California Vehicle Code § 20001(a) provides:

> The driver of any vehicle involved in an accident resulting in injury to any person, other than himself or herself, or in the death of any person shall immediately stop the vehicle at the scene of the accident and shall fulfill the requirements of Sections 20003 and 20004.

crimes, some of which may involve moral turpitude and some of which may not." *Id.* The Court stated that Cal. Penal Code § 20001(a) requires a driver in an accident resulting in injury to stop and provide identification and a vehicle registration number, and that a driver can violate the statute if he stops and provides identification, but fails to provide a vehicle registration number. The Court found that failure to provide a vehicle registration number under such circumstances is not base, vile and depraved and does not necessarily evince any willfulness or evil intent. *Id.* at 1167-1169. Moreover, the Court found that its conclusion was consistent with the Fifth Circuit's decision in [redacted] 491 F.3d 284, 288-89 (5th Cir.2007), where in the Fifth Circuit held that "a conviction under § 550.021 of the Texas Transportation Code, which could be violated both by reprehensible conduct (leaving the scene of an accident) and by conduct that was not morally culpable (failing to affirmatively report identifying information), was not categorically a crime involving moral turpitude." *Id.* at 1169.

Viewed against the [redacted], which indicates that failure to affirmatively report identifying information is not morally turpitudinous, we find that failure to comply with all of the

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Section 20003, entitled "Duty upon injury or death," provides:

> (a) The driver of any vehicle involved in an accident resulting in injury to or death of any person shall also give his or her name, current residence address, the names and current residence addresses of any occupant of the driver's vehicle injured in the accident, the registration number of the vehicle he or she is driving, and the name and current residence address of the owner to the person struck or the driver or occupants of any vehicle collided with, and shall give the information to any traffic or police officer at the scene of the accident. The driver also shall render to any person injured in the accident reasonable assistance, including transporting, or making arrangements for transporting, any injured person to a physician, surgeon, or hospital for medical or surgical treatment if it is apparent that treatment is necessary or if that transportation is requested by any injured person.
>
> (b) Any driver or injured occupant of a driver's vehicle subject to the provisions of subdivision (a) shall also, upon being requested, exhibit his or her driver's license, if available, or, in the case of an injured occupant, any other available identification, to the person struck or to the driver or occupants of any vehicle collided with, and to any traffic or police officer at the scene of the accident.

Section 20004, entitled "Duty upon death," provides:

> "In the event of death of any person resulting from an accident, the driver of any vehicle involved after fulfilling the requirements of this division, and if there be no traffic or police officer at the scene of the accident to whom to give the information required by Section 20003, shall, without delay, report the accident to the nearest office of the Department of the California Highway Patrol or office of a duly authorized police authority and submit with the report the information required by Section 20003."

affirmative reporting requirements under Cal. Vehicle Code § 20002 is not inherently vile, base, or depraved, and consequently, does not involve moral turpitude.

The applicant was convicted of two counts of battery in violation of section 242 of the California Penal Code, and one count of violation of section 242/243 of the California Penal Code (assault upon wife). Cal. Penal Code § 242 defines a battery as "any willful and unlawful use of force or violence upon the person of another," and Cal. Penal Code § 243, which specifies the range of punishments for a battery conviction, provides:

> (a) A battery is punishable by a fine not exceeding two thousand dollars ($2,000), or by imprisonment in a county jail not exceeding six months, or by both that fine and imprisonment.
>
> . . .
>
> (d) When a battery is committed against any person and serious bodily injury is inflicted on the person, the battery is punishable by imprisonment in a county jail not exceeding one year or imprisonment in the state prison for two, three, or four years.
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> (e)(1) When a battery is committed against a spouse, a person with whom the defendant is cohabiting, a person who is the parent of the defendant's child, former spouse, fiancé, or fiancée, or a person with whom the defendant currently has, or has previously had, a dating or engagement relationship, the battery is punishable by a fine not exceeding two thousand dollars ($2,000), or by imprisonment in a county jail for a period of not more than one year, or by both that fine and imprisonment. . . .
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> . . .
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> (4) "Serious bodily injury" means a serious impairment of physical condition, including, but not limited to, the following: loss of consciousness; concussion; bone fracture; protracted loss or impairment of function of any bodily member or organ; a wound requiring extensive suturing; and serious disfigurement.
>
> (5) "Injury" means any physical injury which requires professional medical treatment.
>
> . . .

In *Sanudo*, the Board analyzed whether domestic battery in violation of Cal. Penal Code §§ 242 and 243(e) constitutes a crime involving moral turpitude. 23 I&N Dec. 968, 969. First, the Board assessed the manner in which California courts have applied the "use of force or violence" clause of Cal. Penal Code § 242. *Id.* The Board noted that courts have held that "the force used need not be violent or severe and need not cause pain or bodily harm." *Id.* at 969 (citing *Gunnell v. Metrocolor Labs., Inc.*, 112 Cal. Rptr. 2d 195, 206 (Cal. Ct. App. 2001)). Second, the Board assessed the situations in which assault and battery offenses may be classified as crimes involving moral turpitude. The Board noted that those offenses include assault and battery coupled with aggravating factors such as the use of deadly weapon, the intentional infliction of serious bodily injury, and

bodily harm upon individuals deserving of special protection such as a child, domestic partner, or a peace officer. [redacted] The Board also held that "the existence of a current or former 'domestic' relationship between the perpetrator and the victim is insufficient to establish the morally turpitudinous nature of the crime," and, therefore, a conviction for domestic battery does not qualify categorically as a crime involving moral turpitude. *Id. at* 972-73. The Board further held that under the modified categorical analysis, the admissible portion of the respondent's conviction record failed to reflect that "his battery was injurious to the victim or that it involved anything more than the minimal nonviolent 'touching' necessary to constitute the offense." *Id.*

In essence, the holding i[redacted] is that for a finding of moral turpitude an assault and battery statute requires an aggravating dimension which significantly increases the culpability of the assault and battery offense and distinguishes it from simple assault and battery. The applicant was convicted under Cal. Penal Code §§ 242/243 and 242. A simple battery under Cal. Penal Code § 242 does not categorically involve moral turpitude. *See Sanudo, supra.* Thus, the applicant's conviction under section 242 does not categorically involve moral turpitude. Section 243 of the California Penal Code specifies the range of punishments for a battery conviction, and *Sanudo* indicates that domestic [redacted] 242 and 243(e) does not categorically constitute a crime involving moral turpitude. However, violation of Cal. Penal Code §§ 242 and 243(d) does involve moral turpitude as it has the aggravating factor of inflicting serious bodily injury, with serious bodily injury defined as "loss of consciousness; concussion; bone fracture; protracted loss or impairment of function of any bodily member or organ; a wound requiring extensive suturing; and serious disfigurement." Thus, all of the proscribed conduct under §§ 242 and 243 does not involve moral turpitude.

We must now apply the modified categorical approach to determine whether the conduct of which the applicant was convicted involved moral turpitude. The criminal complaint reflects that the applicant was charged with Count I, violation of section 245(a) of the California Penal Code, willfully and unlawfully commit an assault upon [redacted] by means of force likely to produce great bodily injury, a misdemeanor; however, he was convicted under section 242 of the California Penal Code. For Count II, he was charged with and convicted of violation of section 242/243 of the California Penal Code: willfully and unlawfully using force and violence and inflicting serious bodily injury upon the person of [redacted] a misdemeanor. For Count III, the applicant was charged with and convicted of violation of section 242 of the California Penal Code: willfully and unlawfully using force and violence upon the person of Guadalupe [redacted] Viewed against the background of *Sanudo,* because the criminal complaint indicates that the applicant was convicted of conduct under sections 242 and 243(d) of the California Penal Code that involved moral turpitude, his offenses in violation of sections 242 and 243(d) are morally turpitudious because they involved the aggravating factor of serious bodily injury. Thus, the applicant is inadmissible under section 212(a)(2)(A)(i)(I) for having been convicted of a crime involving moral turpitude.

Lastly, the applicant was convicted under Cal. Vehicle Code § 31 for false information to peace officer. That section provides that "[n]o person shall give, either orally or in writing, information to a peace officer while in the performance of his duties under the provisions of this code when such person knows that the information is false." In view of the fact that the applicant's battery

convictions involve moral turpitude rendering him inadmissible under section 212(a)(2)(A)(i)(I), we need not determine whether his conviction under Cal. Vehicle Code § 31 involves moral turpitude.

The record establishes that the applicant has been convicted of crimes involving moral turpitude, which render him inadmissible under section 212(a)(2)(B) of the Act. The waiver for inadmissibility under section 212(a)(2)(B) of the Act is found under section 212(h) of the Act. That section provides, in pertinent part:

> (h) The Attorney General [Secretary of Homeland Security] may, in his discretion, waive the application of subparagraph (A)(i)(I) . . . of subsection (a)(2) . . . if -
>
> (1) (A) in the case of any immigrant it is established to the satisfaction of the Attorney General [Secretary] that –
>
> (i) . . . the activities for which the alien is inadmissible occurred more than 15 years before the date of the alien's application for a visa, admission, or adjustment of status,
> (ii) the admission to the United States of such alien would not be contrary to the national welfare, safety, or security of the United States, and
> (iii) the alien has been rehabilitated . . .

Because the director has not rendered a decision based on the merits of the applicant's Form I-601 waiver application, this matter shall be remanded to the director to issue a new decision on the waiver application. If the director's decision is adverse to the applicant the decision is to be certified to the AAO for review.

ORDER: The matter is remanded to the director for action consistent with the directives of this decision.